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No. 96-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDY G. SPENCER,

Petitioner,

v.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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26 pp

Questions Presented for Review

I. Whether a state attorney general's office and a district court may delay the response and disposition in a habeas corpus action until the petitioner's claim is arguably moot, then rely on the asserted mootness resulting from their delay to deny relief.

II. Whether the court below erred in holding--in conflict with the Second, Seventh, and Ninth Circuits--that a habeas corpus petition challenging a parole revocation is "moot," when the petitioner was undisputedly in custody under color of the revocation when he filed the petition.

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Petitioner, Randy G. Spencer, prays the Court for its order granting a writ of certiorari to review the judgment of the court below affirming the district court's denial, as moot, of his petition for a writ of habeas corpus.

Opinions Below

The decision of the United States Court of Appeals for the Eighth Circuit appears at 91 F.3d 1114 (8th Cir. 1996). App. 1-8. The one-page order of the district court is unreported. App. 9.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 2, 1996. That court denied the petition and suggestions on September 19, 1996. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

Section 1 of the fourteenth amendment to the Constitution of the United States provides, to the extent it has been invoked in the court of appeals, that: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Subsection (a) of 28 U.S.C. § 2254 provides, in relevant part, that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Local Rule 13.C. of the Rules of United States District Court for the Western District of Missouri provides as follows:

> Suggestions in Opposition. Within twelve (12) days from the time the motion is filed, each party opposing the motion shall serve and file a brief written statement of the reasons in opposition to the motion.

Statement of the Case

As the petitioner has documented in the appendix and explains in this statement, he sought a writ of habeas corpus from a federal district court to challenge the State's revocation of his parole without providing him a preliminary revocation hearing on the most serious of the charges against him, and without affording him the opportunity to cross-examine any of the witnesses against him. Respondents and the district court delayed the habeas corpus action until the petitioner was again released on parole. The district court waited to render a decision until the petitioner had also served the entire term--imprisonment and parole supervision--under which he had been on parole when the State initiated the revocation proceedings in question. The district court then dismissed the action as moot. When the petitioner appealed the dismissal, the court below refused to address his strategic delay grievance, and held that the prejudice the revocation would cause him in future parole considerations did not overcome the "mootness" the respondents and the district court had created.

On June 3, 1992, the petitioner was on parole from two (2) sentences of three (3) years for burglary in the second degree and stealing over $150. App. 56-62. According to a parole violation report, there was a police report which said that on that date, the petitioner met a woman at a crack house; that after smoking crack cocaine, she took the petitioner home with

her; and that he raped her, and had her drive him back to the crack house. App. 60-61.

On July 16, 1992, officers of the Kansas City, Missouri, Police Department arrested the petitioner on a "twenty-hour hold" in connection with the alleged rape of the woman from the crack house. App. 60. The next day, the petitioner's parole officer issued a warrant for his arrest, charging that he had violated two (2) conditions of his parole by committing the crime of rape, and by possessing and using crack cocaine. App. 89. The parole officer interviewed the petitioner, and tendered him a waiver of a preliminary revocation hearing on the two (2) alleged violations. According to the petitioner's undisputed account of the interview, the officer told him that the waiver was "only a formality." App. 66. Petitioner signed the waiver. App. 90. The parole officer reported that the petitioner had been convicted of sodomy in 1983, had received a sentence of imprisonment for five (5) years, and was a "registered sex offender." App. 62. Nonetheless, the parole officer recommended that the Board continue the petitioner on parole pending the prosecutor's decision whether to charge him with raping the woman from the crack house. App. 62.

On August 6, 1992, the parole officer issued a violation report charging the petitioner with a third violation of his parole: using a dangerous weapon. The violation report said the police report said the woman from the crack house said that the petitioner had "pressed" the screwdriver against her side, but

that she "wasn't clear at what point that happened." App. 61. Petitioner did not execute a waiver of a preliminary revocation hearing on this third charge. App. 67.

If a Missouri jury had believed that the petitioner had raped the woman from the crack house; that a screwdriver was a "deadly weapon or dangerous instrument"; and that the petitioner had "display[ed]" it "in a threatening manner" during the rape, this additional charge would have aggravated the case against the petitioner from an unclassified felony to a "class A" felony. Mo. Rev. Stat. § 556.030.2 (Supp. 1992). If the jury had found that a screwdriver was a "dangerous instrument or deadly weapon," and that the petitioner had raped the woman from the crack house "by, with, or through the use, assistance, or aid" of the screwdriver, the petitioner could also have been convicted of the separate felony of "armed criminal action." Mo. Rev. Stat. § 571.015 (1994). As a "class A" felon, the petitioner would received a sentence of not less than ten (10) years or as long as life imprisonment. Mo. Rev. Stat. § 558.011.1(1) (Supp. 1992). For "armed criminal action," the petitioner would have received not less than three (3) years up to life imprisonment, with this term to run consecutively to the term for the underlying felony. Mo. Rev. Stat. § 571.015.1 (1994). Thus, the additional charge changed the petitioner's sentencing exposure from a minimum of five (5) years to a minimum of thirteen (13) years and the potential for two (2) consecutive life sentences.

On August 25, 1992, corrections staff transferred the

petitioner from the local jail to the Department of Corrections. App. 56 & 68. On September 14, 1992, an institutional parole officer told him that his final revocation hearing would be in ten (10) days; that the petitioner was responsible for obtaining any witnesses he wanted to call at the hearing; and that he could have one stamp and one telephone call with which to do so. App. 51 & 69. Relying on a state parole regulation to the effect that persons accused of parole violations "may have a representative of their choice" at the final revocation hearing, the petitioner requested the presence of an inmate paralegal at the institution; the Board denied the request. App. 92.

At the hearing on September 24, 1992, the State called no witnesses. It presented no "evidence" besides the violation report. At no point was the petitioner afforded the opportunity to cross-examine either his accuser or those who reported her out-of-court statements or the person who reported his asserted confession to having smoked crack cocaine. On the rape and armed criminal action charges, the only "evidence" that the petitioner had violated the terms of his parole were the out-of-court statements of the parole officer as to the out-of-court statements of unnamed police officers as to the out-of-court statements of the petitioner's accuser as to what she recalled happened when she was smoking crack cocaine. On the drug charge, the only evidence was the parole officer's out-of-court statement that the petitioner had admitted smoking the substance--which the petitioner denied. App. 72.

The Board revoked the petitioner's parole, relying on all three (3) of the asserted violations. It expressly based its findings on the initial violation report:

> Evidence relied upon for violation is from the Initial Violation Report dated 7-27-92.

App. 50. Petitioner did not receive a copy of the order revoking parole and setting forth the Board's basis for doing so until four months after the hearing. App. 78 & 93. At that time he also received notice that the Board had "automatically" extended his incarceration from his "conditional release" date of October 16, 1992, to his maximum release date of October 16, 1993, before the hearing on the revocation--solely on the basis of the violation report. App. 73-83, 90 & 94. See Mo. Rev. Stat. § 558.011.4-5 (Supp. 1992)(defining "conditional release" and prescribing procedure to be followed in extending it). Subsequently the State mitigated the effect of this action by finding the petitioner eligible for statutory "good time," Mo. Rev. Stat. § 558.041 (Supp. 1992), allowing him to be released on parole once more on August 7, 1993. App. 47.

Petitioner presented his constitutional grievances concerning the parole revocation in successive habeas corpus petitions before the circuit court of the county in which he was then a prisoner, before an intermediate appellate court, and before the Supreme Court of Missouri. App. 16-18, 39-40 & 83-84. All three (3) courts denied relief.

Three (3) days after the Supreme Court of Missouri denied

relief, the petitioner executed an application for a writ of habeas corpus from the United States District Court for the Western District of Missouri. App. 18 & 21. Petitioner raised four (4) grounds for relief:

> 1. The Board denied him his right to a preliminary revocation hearing on the armed criminal action charge, in that he had a right to such a hearing and did not waive it as to this additional charge.
>
> 2. The Board denied him a hearing on the cancellation of his conditional release date.
>
> 3. The Board denied him the minimum due process rights concerning his final revocation hearing, in that:
>
> a. It denied him the right to confront and cross-examine any of the witnesses against him, but relied solely on the out-of-court statements in the initial violation report.
>
> b. It gave him no notice that the entire case for revoking his parole would be the out-of-court statements in the violation report.
>
> c. It denied him the right to representation by a person of his choice.
>
> 4. The Board failed to apprise him of the fact of its decision to revoke his parole, and of the evidence it relied on in doing so, for four (4) months, when its regulations required that such a statement be prepared within ten (10) working days of the hearing, and that the parolee be provided this statement within ten (10) working days from the date of the decision.

App. 19-20.

On April 1, 1993, the district court filed the application, and the Pro Se Office of the clerk of that court assumed jurisdiction over the cause. App. 12. On April 5, 1993, the district court directed the petitioner to file an affidavit establishing his in forma pauperis status; he did so three (3) days later. App. 12 (Doc. Nos. 2-3). Nearly a month later, the district court ordered the respondents to file an answer within thirty (30) days of its order. App. 22-23.

On May 1, 1993, an Assistant Attorney General filed a motion for extension of time to file the respondents' answer to the district court's order. App. 24-26. The motion recited the following reason:

> That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, written and filed numerous briefs, and prepared for and made several oral arguments in the various courts in the State of Missouri. Due to this litigation, respondent has been delayed in the completion of his brief in the above-styled case.

App. 24.

Under Local Rule 13.C. of the United States District Court for the Western District of Missouri, the petitioner had an initial period of twelve (12) days in which to respond to this motion. Because the respondents' counsel served the motion on the petitioner by mail, the petitioner had an additional three (3) days in which to respond. Fed. R. Civ. P. 6(e). Petitioner's response was therefore due fifteen (15) days after service of the respondents' motion. Petitioner filed his

response on June 8, 1993--a week after the respondents filed their motion. App. 28-29. On June 3, however, the district court had granted the respondents' motion by signing their draft order. App. 27.

Respondents' first motion for extension of time had sought, and obtained, an additional twenty-one (21) days. On Day 21, however, another Assistant Attorney General entered his appearance as counsel for the respondents. App. 32. The same day, he filed a second motion for extension of time--seeking an additional fourteen (14) days. Like his predecessor, the second Assistant Attorney General pleaded:

> That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, and has written and filed numerous briefs in the Eighth Circuit Court of Appeals and has prepared for and made several oral arguments in the Eighth Circuit. Due to this litigation, respondent has been unable to complete the response in the above-styled case[.]

App. 30. Once more, the petitioner filed a timely objection--pointing out that in both instances the successive attorneys for the respondents had waited until the last day to file their motions for additional time, when in fact the generalized reasons they pleaded were, if true, well known to them in advance. App. 33-36. The same day, the district court issued a form order granting the extension. App. 37.

On the last day allowed for filing an answer--July 7, 1993--the respondents filed a response noting that "petitioner has been scheduled for parole release on August 7, 1993." Respondents

observed, as well, that "petitioner will complete the service of his entire term of imprisonment on October 16, 1993." App. 38 n.1.

A week after the respondents filed their answer, the petitioner filed a reply--starting and finishing by calling the district court's attention to the impending date of his release, and to the threat that his grievances would be held moot. App. 64-65 & 89. Petitioner addressed the respondents' answer by buttressing his petition with exhibits, with discussions of this Court's decisions in Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973), and with citations to several lower-court decisions applying these precedents. App. 65-89.

The day after the petitioner filed this pleading, the district court ordered him to file a "reply" to the respondents' response on pain of dismissal. App. 95. On July 22 the petitioner wrote the district court a letter, and on July 26 he filed a pleading, pointing out that his pleading of July 14 had included a reply to the respondents' response. App. 96-97.

On August 7, 1993, the State released the petitioner on parole. App. 38 n.1. On August 13, 1993, he filed a notice of change of address reflecting that he was no longer in prison. App. 98. On October 16, 1993, the full term of his concurrent sentences for burglary and stealing expired. App. 38 n.1.

On February 3, 1994, the district court issued a one-paragraph order "not[ing]" that the petitioner had filed his

pleading of July 14, 1993, in which he had sought an adjudication of his parole-revocation claims before he was released on parole again and before his entire sentence had expired. The order recited that "[t]he resolution of this case will not be delayed beyond the requirements of this Court's docket." App. 99.

On August 23, 1995--over two (2) years and four (4) months after the petitioner filed his application--the district court issued a one-page order denying relief. Relying on the respondents' response concerning the petitioner's then-forthcoming release on parole, it held that the petitioner's grievances had become moot. App. 9. On October 5, 1995, the district court summarily denied the petitioner's application for a certificate of probable cause--reciting that "this case presents issues which are not deserving of appellate review[.]" App. 100-01.

The United States Court of Appeals for the Eighth Circuit granted a certificate of probable cause. By the time of the appeal, the petitioner was once more in the Missouri Department of Corrections on an unrelated charge. On appeal, the petitioner argued, first, that the respondents should not be allowed to avoid his grievances on the ground of mootness, because the respondents' delays contributed to the alleged mootness; second, that the petitioner's case fell within an established exception to the principle of mootness where the public interest requires that an issue be decided notwithstanding its apparent mootness in an individual's case; and third, that the petitioner's grievances were not moot, because under the facts and circumstances of his

case, the past revocation of his parole would make it less likely for him to receive parole consideration again.

The panel of the court below held that under this Court's decision in Lane v. Williams, 455 U.S. 624 (1982), the ongoing consequences of the petitioner's parole revocation were "too speculative to overcome a finding of mootness." App. 3-6. It found that there was not a "reasonable likelihood" that the petitioner would "once again be affected by the Board's revocation procedures." App. 6-7. At no point in its opinion did the panel address the strategic delay grievance which the petitioner had repeatedly raised pro se, and which had been appointed counsel's first argument on appeal. App. 1-7. In a separate opinion, Senior Judge Heaney characterized it as "unfortunate" that the petitioner's claim had been mooted by delays in the district court, and observed that his case "highlights the necessity of making prompt decisions in revocation cases." App. 7-8.

Petitioner filed a petition and suggestions, seeking rehearing and rehearing en banc. App. 102-10. He emphasized the panel's failure to address the strategic delay issue. App. 105 & 107-08. On September 19, 1996, the court below denied rehearing and rehearing en banc. App. 10.

This timely petition followed.

Argument

I. A state attorney general's office and a district court may not delay the response and disposition in a habeas corpus action until the petitioner's claim is arguably moot, then rely on the asserted mootness resulting from their delay to deny relief.

Petitioner's first point raises an issue whether the court below "has so far departed departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S.S.Ct.R. 10(a). The district court allowed the respondents to delay a response virtually until the eve of the petitioner's release on parole, then delayed the case itself for over a year. When the petitioner objected on appeal to the use of this delay as the basis for a finding of mootness, the court of appeals refused to address the issue. That is not the accepted and usual course of judicial proceedings.

By granting leave to proceed in forma pauperis and by granting a certificate of probable cause, respectively, the district court and the court of appeals have recognized that the petitioner has presented one or more non-frivolous claims of Fourteenth Amendment due process violations concerning his parole revocation. No federal court has addressed the merits of his grievances. Neither the district court nor the court below

addressed the merits of his grievances because it allowed the respondents to delay their answer until a month before the petitioner was due for release for good behavior. App. 38 & n.1; App. 9.

In moving for enlargements of time adding up to five (5) weeks, the respondents' counsel cited no particular facts justifying the delay. Both of the respondents' counsel in the district court used substantially the same conclusory boilerplate that did not allow the district court to confirm their excuses by reference to cases before it and other courts. Respondents gave no reason for reassigning the case from one attorney to another. App. 24 & 30. Although the applicable rules of civil procedure allowed the petitioner fifteen (15) days in which to respond to the motions, the district court waited not for an answer. App. 27 & 37.

The court below has held that a Missouri pro se prisoner is chargeable with knowledge of the contents of his or her Adult Institutions Face Sheet, whether or not the prisoner has received it; that court enforced a procedural default based on a prisoner's failure to act on information on his face sheet. Griffini v. Mitchell, 31 F.3d 690 (8th Cir. 1994). With the vast resources of the State at their beck and call, the respondents' counsel should be held to no less exacting a standard. Applying the principle of Griffini to both sides in habeas corpus litigation, counsel knew or should have known from the time they appeared in the action (June 1, 1993) that the petitioner's

sentence would expire on October 16, 1993. App. 56-57. Because Griffini attributes knowledge of the contents of a face sheet to a pro se party, moreover, the respondents were in fact chargeable with knowledge of the petitioner's impending release date from the time he filed his federal action. The district court's handling of this claim allows the respondents to be judges in their own case. Dr. Bonham's Case, 8 Co. Rep. 114a (C.P. 1610). See also Tumey v. Ohio, 273 U.S. 510 (1927).

Recently the political branches have sought to limit the occasions in which a prisoner may seek relief in federal habeas corpus. Pub. L. 104-132, 110 Stat. 1218 (approved April 24, 1996). Even in the recently-limited statutes, no provision suggests that a respondent may delay a response until the eve of a prisoner's release, then rely on mootness as a defense to a non-frivolous federal constitutional grievance; *that* would have been too strong even for the political branches. In light of the facts of this case, it is ironic that the impetus for the habeas corpus limitation portions of the Antiterrorism and Effective Death Penalty Act of 1996 was the concern of respondents that prisoners were avoiding the just disposition of their cases by dilatory tactics. Here the respondents have done just the same thing when it has suited their purpose, and the lower courts have allowed them to get away with it. The court below excused a Missouri prisoner from exhausting state remedies when the state courts handled his case with this effect. Chitwood v. Dowd, 889 F.2d 781, 784-85 (8th Cir. 1989). It fails to explain why the

result should be different when the delay occurs on a federal court's watch."

The court below noted that the petitioner is now facing the prospect that the Board's finding--on the basis of triple hearsay about what a declarant experienced while under the influence of crack cocaine--that the petitioner committed two (2) extremely serious crimes of violence is somehow attributable to the petitioner because he was once again convicted of a crime. App. 6. Carried to its logical extreme, this barb would eliminate collateral consequences in future parole consideration as a basis for deciding a claim filed when the petitioner was in custody if the case is delayed past his or her release. One could *always* blame the citizen whose rights the government has violated for the fact that he or she is once more before a parole board or a sentencing court.

That is not how the Constitution works. If the courts are only willing to apply the Bill of Rights when it protects deacons wardens and den mothers, it will not long be a protection even for them. See R. Bolt, A Man for All Seasons, act I, p. 147 (Three Plays, Heinemann ed. 1967)(Anglo-American legal tradition would give the Devil the benefit of the law, for the protection of honest citizens). This Court has given effect to the Bill of Rights and the Civil War Amendments *primarily* in the cases of those--like Randy Spencer--who are in trouble with the law.

Randy Spencer has been convicted of several crimes against the State of Missouri, and Randy Spencer has suffered for them.

The legitimacy of his punishment is not before this Court. The question before this Court is whether the laws that apply to Randy Spencer also apply to the Attorney General of the State of Missouri and to its Department of Corrections.

II. The court below erred in holding--in conflict with the Second, Seventh, and Ninth Circuits--that a habeas corpus petition challenging a parole revocation is "moot," when the petitioner was undisputedly in custody under color of the revocation when he filed the petition.

Respondents' and the district court's knowing delay--as documented in the statement of the case and appendix, and as discussed in the petitioner's first point--is sufficient to distinguish this case from Lane. In this respect the court below has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. U.S.S.Ct.R. 10(a).

In addition, the court below has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, U.S.S.Ct.R. 10(a), in that it appears from the face of the opinion in question that the Eighth Circuit's disposition of this question is in conflict with that of the Second and Ninth Circuits. App. 4-5. It acknowledges that United States v. Parker, 952 F.2d 31, 33 (2d Cir. 1991), and Robbins v. Christianson, 904 F.2d 492, 495-96 (9th Cir. 1990), would allow a finding of collateral consequences such as the one in this case to overcome an objection of mootness. In the one (albeit unpublished) opinion that has so far cited the opinion of the court below, the Tenth Circuit notes the conflict. Lane v. Kindt, 97 F.3d 1464 (Table), 1996 WL

532119, **1 (10th Cir. Sept. 19, 1996). This Court should resolve the conflict.

It is disingenuous to suggest that the Board of Probation and Parole will not take into account its own finding that the petitioner was, in effect, guilty of "class A" forcible rape and armed criminal action. Consider the petitioner's parole officer's reference to a prior conviction and sentence in his initial violation report. App. 62. A parole revocation for forcible rape and armed criminal action is simply not a speculative factor.

Although the facts in this case are egregious, the petitioner's situation is far from unique. The practical effect of letting the lower court's decision stand would be that respondents and district courts could avoid decisions enforcing federal constitutional rights of probationers and parolees by running down the clock until their claims become "moot."

Jurisdictions including the United States are steadily requiring prisoners to serve greater proportions of the time to which trial courts sentence them. As the length of time prisoners are on parole decreases, the temptation to run down the clock on meritorious constitutional challenges to parole revocations increases. This combination of factors creates a perverse incentive to play fast and loose with parolees whom a crackhead or an enemy turns in for a parole violation.

Allowing official conduct of the type the court below *did not even choose to address* would send a message that if a proba-

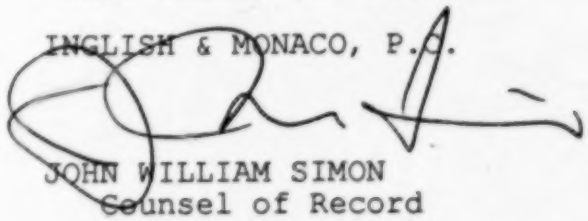
tioner or parolee is within two and a half (2½) years of his or her maximum release date, then Morrissey and Gagnon are dead letters, and the probationer or parolee has no rights the government is bound to respect.

Conclusion

WHEREFORE, the petitioner prays the Court for its order granting the pending petition for a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

INGLISH & MONACO, P.C.



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